

***United States Court of Appeals
for the Second Circuit***



PETITION

74-2537

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ANTHONY B. CATALDO, and
ADA W. CATALDO, :
Plaintiff, :
-against- :
UNITED STATES OF AMERICA, :
Defendant. :

In the Matter of the Civil Contempt of "
ANTHONY B. CATALDO
Appellant. :
----- X

DOCKET NO.
74-2537
P/S

PETITION FOR RE-ARGUMENT



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PETITION FOR RE-HEARING

To the Honorable, the Judges of the United States Court of
Appeals, Second Circuit:

The petition of Anthony B. Cataldo to this honorable
respectfully shows:

1. That he is the appellant appealing from on
order dated October 16, 1974 made by the Hon. Richard H. Levett
denying appellants' motions to vacate or re-settle his order
of May 18, 1973.

2. That said order of May 18, 1973 held appellant
for a contempt denominated by the court as a civil contempt,
and fined him \$50.

3. Said order of contempt was entered within the
civil action in the above caption tried on May 10, 11 and 14,
1973 in which petitioner with his wife were plaintiffs suing

the United States of America for the return of monies collected upon an assessment that was alleged to be arbitrary and capricious. Appellant is an attorney-at-law and was trial counsel in said case.

4. The said refund suit was dismissed and an appeal ensued from the final judgment therein.

5. That petitioner included in his points for review on said appeal, the matter of vacating said order of contempt of May 18, 1973 as an unlawful order.

6. On said appeal, this honorable court refused to consider the merits of said order of May 18, 1972 on the ground that said order was criminal in nature and a separate appeal should have been taken therefrom, but as it wasn't, this court held in did not have jurisdiction to review it.

7. Petitioner moved thereafter before Judge Levett to vacate said order or to resettle it chiefly on the ground that his mis-labelling of said order as a civil contempt was its mistake. Appellant's action in seeking a review of said order on the appeal from the final judgment in the action would have been the correct procedure had the order been a civil contempt. As it turned out his right to a review said order was held not be properly before the Court of Appeals and yet, the error was the error of Judge Levett.

8. On October 16, 1974, Judge Levett denied the motion to vacate or resettle said order of May 18, 1972.

9. Petitioner then appealed from the order of

denial in the belief that the said decision was an abuse of discretion and that said appeal would bring up for review the order of May 18, 1972 which would be affected thereby.

10. This court by its order of April 17, 1975 affirmed saying "the order of said District Court be and hereby is affirmed". A true copy of said order is hereto attached.

11. No opinion or any statements of reasons was expressed by this court for such affirmance. It is to be noted that the affirmance was of the order (singular). Consequently, this court seems to have affirmed the order of October 16, 1975 and by the same token, it has refused to consider the merits of the order of May 18, 1973.

12. The basis of this conclusion is that appellee had argued only the theory that the appeal taken was only from the order of October 16, 1974 and not from the order of May 18, 1973; that the only review that could be had was of the October 16, 1974 order and as the relief requested lay within the discretion of the court, the order should be affirmed.

13. Indeed, on the argument this court, sua sponte, suggested to petitioner when he got to arguing the unlawfulness of the May 18, 1973 order and of its consequences, that such argument was irrelevant. Whereupon, petitioner called attention to the fact that the denial of the motion to resettle

or vacate said order of May 18, 1973, in the face of the action of this court in holding it to be a criminal judgment whereas the trial court had stated that it was civil contempt order, was an abuse of discretion. Not to correct a court's mistake which tended to deprive appellant of his right to a review of a contempt judgment on the merits is an abuse of discretion. Judicial discretion has to be differentiated from an arbitrary use of discretion. The latter is generally characterized by a failure to observe the law; e.g. Hyam v. American Export Lines, (C.A. 2) 213 F (2) 221. See also Bouvier's Law Dictionary, 3rd Rev., Discretion, p. 884.

14. Nevertheless, the argument of appellee was unsound as it was not supported by any facts that would show that the denial was a proper use of judicial discretion, and it overlooked the compelling additional reason for vacation that said order having been entered without any specifications of facts showing contemptuous conduct and having been made without a hearing, violated petitioner's constitutional rights to due process and the established rule of law respecting contempt orders. The court's refusal to vacate one of its void orders cannot be anything else but an abuse of discretion.

15. In any event the merits of the order of May 18, 1973 do not seem to have been passed on by this court.

16. Petitioner has not "waived" or otherwise lost his right to review said order of May 18, 1973 upon its merits because the time to appeal from said order has never commenced

to run. Rule 4 (b) of the Rules of Federal Appellate Procedure specifies that an appeal may be taken from a criminal order or judgment within 10 days of the entry of such order or judgment in the criminal docket and if such order or judgment has not been entered in the criminal docket but a notice of appeal therefrom has been filed, then the time to appeal starts to run from the filing of the notice of appeal.

17. Said order of May 18, 1973 has never been entered in the criminal docket and the time to appeal from it has never commenced to run. It is an appealable order because it is a final judgment. Accordingly, petitioner did on the 21st day of April, 1975 file a notice of appeal from such order and he has docketed said appeal in this court under No. 75-6012.

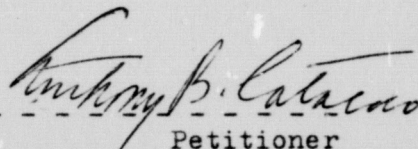
18. Accordingly, petitioner respectfully asks this court to delay the entry of a final order herein until the consideration of the appeal from the order of May 18, 1973, so that if this court shall refuse to consider the petitioner's claims that the order of the May 18, 1973 was unlawful, petitioner may apply for a writ of certiorari from both actions of this court simultaneously. The stay could be effected without prejudice to appellee. The joint application for such a writ would be in the interest of judicial economy and of substantial justice. Perhaps this court might direct an accelerated hearing of the new appeal as a means of concluding the matter by a reversal or of coordinating the two orders of

this court so that a single petition might be made to the Supreme Court.

19. Petitioner affirms, under penalties of perjury, that this petition is filed in good faith and it is not done for any purpose of delay or harrasment. Petitioner means no disrespect toward this court. He is motivated by his interest in securing his exoneration from the charge of contempt.

WHEREFORE, petitioner respectfully moves this court, if it will not change its affirmance and reverse the order, for an abuse of discretion, to keep petitioner's time to file a petition to the Supreme Court from running until the appeal from the May 18, 1973 order is heard and determined.

Dated, New York, N.Y.
April 25, 1975



Petitioner

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FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ^{seventeenth} day of April one thousand nine hundred and ^{seventy-five}.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. J. EDWARD LUMBARD

HON. J. JOSEPH SMITH,
Circuit Judges,

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

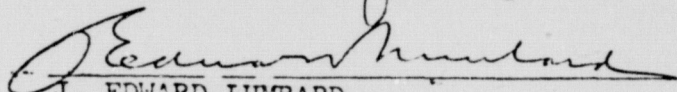
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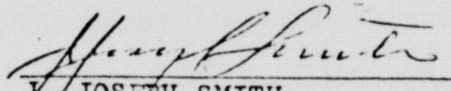
Appeal from the United States District Court for the Southern District of New York.

This case came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, advised, and decreed that the order of the District Court be and is hereby affirmed.


IRVING R. KAUFMAN, Ch. Judge.


J. EDWARD LUMBARD,


J. JOSEPH SMITH,
Circuit Judges.